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SOAH DOCKET NO. 473-21-0538

PUC DOCKET NO. 51415

2021 MAY 17 PM 3:00

APPLICATION OF SOUTHWESTERN § BEFORE THE STATE OFFICE
ELECTRIC POWER COMPANY FOR § OF
AUTHORITY TO CHANGE RATES § ADMINISTRATIVE HEARINGS

**SOAH ORDER NO. 12
DENYING MOTION FOR RECONSIDERATION OF SOAH ORDER NO. 7;
DENYING MOTION TO COMPEL**

I. MOTION FOR RECONSIDERATION OF SOAH ORDER NO. 7

On May 7, 2021, Sierra Club filed a motion for reconsideration of SOAH Order No. 7, which struck Section 5 of the direct testimony of Sierra Club witness Devi Glick.¹ On May 14, 2021, Southwestern Electric Power Company (SWEPCO) filed a response. For the reasons discussed below, the motion for reconsideration is **DENIED**.

Sierra Club advances three reasons for reconsidering SOAH Order No. 7. First, Sierra Club contends that the order “impermissibly decides ultimate issues of fact and law without a hearing and without any evidentiary basis.” Specifically, Sierra Club asserts that the Administrative Law Judges (ALJs) improperly relied on arguments of SWEPCO’s attorneys, rather than admissible evidence, to conclude that SWEPCO is not seeking to recover costs in this proceeding to retrofit the Flint Creek power plant, and that SWEPCO did not decide to retrofit Flint Creek in the test year. Second, according to Sierra Club, the order “erroneously precludes [it] from presenting factual evidence and argument challenging the prudence of SWEPCO’s ongoing spending at Flint Creek” that SWEPCO seeks to recover in this proceeding. Third, Sierra Club argues that the order “effectively strips the [Public Utility] Commission of Texas [(Commission)] of its authority to regulate and supervise ongoing utility planning and investments.”

¹ In the alternative, Sierra Club appealed SOAH Order No. 7 to the Public Utility Commission of Texas (Commission). On May 13, 2021, the Commission issued a memorandum stating that no Commissioner had voted to add the appeal to an open meeting agenda.

In response, SWEPCO reasserts that its decision to retrofit Flint Creek was made outside of the historical test year and the related expenditures that Sierra Club seeks to challenge are not being reviewed or recovered in this case. SWEPCO confirms that the costs incurred to date are construction work in progress (CWIP) and therefore not includable in its cost of service.² Because it does not seek to recover these costs in this case, SWEPCO contends that Ms. Glick's testimony does not bear on an ultimate issue of law or fact in this proceeding, nor is Sierra Club precluded from presenting evidence on costs SWEPCO "indisputably seeks to recover in rates" in this case as Sierra Club claims. SWEPCO also disagrees that the Commission has been stripped of regulatory authority, noting that customers will not pay any charges incurred for the Flint Creek retrofit until after it is placed into service and reviewed and approved by the Commission in a future case.

The ALJs conclude that Sierra Club has not demonstrated that reconsideration of SOAH Order No. 7 is warranted. SWEPCO's assertion that it does not seek to recover costs to retrofit Flint Creek in this case is supported not only by the representations of its counsel, but by its application, which indicates that the project costs Sierra Club references are CWIP.³ But more critically, given the posture of this proceeding, and as stated in SOAH Order No. 7, SWEPCO will not be allowed to recover Flint Creek retrofit costs in this case. In this respect, SWEPCO's repeated assurances that it does not seek to recover Flint Creek retrofit costs in this case are akin to a pleading in a lawsuit that explicitly disclaims intent to recover some element of damages; having done so, the claimant cannot then recover that element of damages in the judgment.

Nor does SOAH Order No. 7 preclude Sierra Club from addressing the Flint Creek capital costs and O&M expenses that SWEPCO does seek to recover in this proceeding. SOAH Order No. 7 struck only Section 5 of Ms. Glick's testimony—the portion addressing the Flint Creek retrofit costs that are not at issue in this proceeding—and did not disturb remaining portions that address spending during the test year that are at issue.

² See 16 Tex. Admin. Code § 25.231(c)(2)(D).

³ See SWEPCO Application at Schedule C-4.1, line 182. The project is also not listed on Schedule H-5.2b, which is the schedule that lists the capital investments SWEPCO is requesting to include in rate base in this case.

Finally, SOAH Order No. 7 does not imperil or “strip the Commission of its authority to regulate or supervise ongoing utility planning and investments.” If and when SWEPCO seeks to recover the costs of retrofitting Flint Creek in a future rate case, the prudence of those expenditures will be subject to Commission scrutiny, and only if deemed appropriate will they ever be passed on to consumers. In short, the Commission’s regulatory authority to address SWEPCO’s planning and investments remains fully intact.

Accordingly, Sierra Club’s motion for reconsideration of SOAH Order No. 7 is **DENIED**.

II. MOTION TO COMPEL

On May 11, 2021, Sierra Club filed a motion to compel SWEPCO to respond to Sierra Club’s request for information (RFI) Nos. 6-6 to 6-9. SWEPCO responded on May 14, 2021. For the reasons discussed below, the motion is **DENIED**.

SWEPCO objects to Sierra Club RFI Nos. 6-6 to 6-9 on the basis of relevance. The RFIs pertain to Section 4 of SWEPCO witness Mark A. Becker’s rebuttal testimony, which responds to Sierra Club witness Ms. Glick’s testimony that was struck by SOAH Order No. 7. Specifically, the RFIs seek information regarding the unit disposition analyses that SWEPCO conducted to support its decision to retrofit Flint Creek. According to SWEPCO, the RFIs seek information that is not related to its request for relief in this proceeding. SWEPCO also represents that it does not intend to offer Section 4 of Mr. Becker’s rebuttal testimony into evidence.


Sierra Club’s motion to compel is tied, in part, to its motion for reconsideration of SOAH Order No. 7. If SOAH Order No. 7 is reversed, Sierra Club states that compelling responses to the disputed RFIs would necessarily follow. But even if SOAH Order No. 7 stands, Sierra Club insists SWEPCO’s responses should nevertheless be compelled because the RFIs are relevant to ongoing test year spending at Flint Creek that SWEPCO proposes to include in rates in this case.


Sierra Club asserts that the unit disposition analyses are relevant to the total cost of operating Flint Creek, including annual fixed O&M and other ongoing capital expenditures. According to Sierra Club, responses to the RFIs will aid in demonstrating that SWEPCO's economic analysis of Flint Creek was flawed and biased toward continuing to operate the plant, and therefore call into question the prudence of SWEPCO's test-year capital and O&M spending at the plant.

SWEPCO responds that Sierra Club ignores that the scope of this proceeding does not include capital projects or costs associated with the decision to retrofit Flint Creek. SWEPCO contends that Sierra Club inaccurately states that the information sought is relevant to ongoing test year spending at the Flint Creek. Further, because the test year in this proceeding ended March 31, 2020, SWEPCO states it is unclear what Sierra Club means by "ongoing test year spending."

The ALJs find that Sierra Club RFI Nos. 6-6 to 6-9 relate to the prudence of SWEPCO's decision to retrofit Flint Creek, which is beyond the scope of this proceeding. Therefore, the ALJs conclude that the requested information does not pertain to a fact of consequence in this proceeding,⁴ and is not reasonably calculated to lead to the discovery of admissible evidence.⁵ Accordingly, Sierra Club's motion to compel responses to RFI Nos. 6-6 to 6-9 is **DENIED**. Consistent with SWEPCO's representation, Section 4 of Mr. Becker's rebuttal testimony will not be admitted into evidence.

SIGNED May 17, 2021.


STEVEN H. NEINAST
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS


ROBERT H. PEMBERTON
ADMINISTRATIVE LAW JUDGE
STATE OFFICE OF ADMINISTRATIVE HEARINGS

⁴ See Tex. R. Evid. 401(b).

⁵ See Tex. R. Civ. P. 192.3(a).